

## REMARKS

### **I. Status of the Application**

Claims 15, 20-22 and 26-28 are pending in this application. In the May 14, 2008 Office action, the Examiner rejected claims 15, 21-22, and 27-28 under 35 U.S.C. § 102(e) as allegedly being anticipated by U.S. Patent Application no. 2002/0152306 A1 to Tuck, III et al. (hereinafter "Tuck"). The Examiner has also rejected claims 20 and 26 under 35 U.S.C. § 103(a) as allegedly being obvious over Tuck in view of European Patent Application No. 1058424 A2 to Yazaki et al. (hereinafter "Yazaki"). The Examiner has also objected to Fig. 1 of the drawings under 37 CFR § 1.121(d) because of informalities.

In this response, applicant has submitted a replacement drawing, amended claims 15 and 22, and cancelled claim 28. As set forth below, applicant respectfully traverses the Examiner's rejection of claims 15, 20-22, and 26-27.

Applicant initially notes that Tuck is substantially the same disclosure as U.S. Patent No. 6,381,649 to Carlson et al., which was cited against the claims of the present application in the October 16, 2007 Office action. Therefore the previous arguments against Carlson are incorporated by reference herein in relation to objections based on Tuck.

### **II. Drawings**

Figure 1 has been amended to include the descriptive legends. Applicant submits the drawings are now in compliance with 37 CFR § 1.121(d).

**III. The Rejection of Independent Claims 15 and 22 Under 35 U.S.C. 102(e)**  
**Should Be Withdrawn**

In the May 14, 2008 office action, the examiner rejected claims 15 and 22 under 35 U.S.C. § 102(e) as being anticipated by Tuck. As provided in MPEP § 2131, “A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 USPQ2d 1051, 1053 (Fed. Cir. 1987). “The identical invention must be shown in as complete detail as is contained in the ... claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ 2d 1913, 1920 (Fed. Cir. 1989). In addition, the elements must be arranged as required by the claim. *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990).

The Tuck reference does not disclose all the limitations of amended claims 15 and 22. For example, claim 22 includes the limitations of “subtracting the size of the packet from a value stored in the bandwidth counter corresponding to the set of one or more flows to obtain an adjusted value” and “replenishing each bandwidth counter with a predetermined value at regular intervals”. Similar limitations are also found in claim 15. Various embodiments of the system for controlling bandwidth allocation as disclosed in the present application call for the packet length of each packet to be subtracted from the token bucket or bandwidth counter, and the token bucket to be replenished with a predetermined value at a regular interval. Limitations related to these embodiments are set forth in claims 15 and 22.

Tuck has a token bucket from which the packet length is added and the value of a free flowing counter is subtracted each time a packet arrives [see abstract]. Therefore Tuck does not disclose the limitations of “subtracting the size of the packet from a value

stored in the bandwidth counter corresponding to the set of one or more flows to obtain an adjusted value” and “replenishing each bandwidth counter with a predetermined value at regular intervals” as set forth in claim 22 (with related limitations in claim 15).

Accordingly, for at least these reasons, Tuck does not disclose all limitations of amended claims 15 and 22 of the present application. Therefore, it is respectfully submitted that amended claims 15 and 22 are allowable and the examiner’s rejection of claims 15 and 22 as anticipated by Tuck under 35 U.S.C. § 102(e) should be withdrawn.

**IV. The Rejection of Dependent Claims 20, 21, 26 and 27 Should be Withdrawn**

**A. Claims 20, 21, 26 and 27 All Depend from an Allowable Base Claim**

Dependent claims 20, 21, 26 and 27 all depend from and incorporate all the limitations of one of allowable independent claims 15 or 22. Accordingly, it is respectfully submitted that dependent claims 20, 21, 26 and 27 are also allowable for at least the same reasons the independent claims 15 and 22 are allowable. However, dependent claims 20, 21, 26 and 27 are also allowable for additional reasons, including the reasons set forth below with respect to dependent claims 20 and 26.

**B. The Rejection of Claims 20 and 26 Under 35 U.S.C. § 103(a) Should be Withdrawn**

In the May 14, 2008 Office action, the examiner rejected claims 20 and 26 under 35 U.S.C. § 103(a) as allegedly being obvious and unpatentable over Tuck in view of Yazaki. Applicant respectfully traverse the examiner’s rejection of claims 20 and 26 under 35 U.S.C. § 103(a), as the examiner has not made a *prima facie* case of obviousness as described in MPEP § 2142 - 2143.

The examiner's rationale for a finding of obviousness in the May 14, 2008 Office action is not specifically stated in the context of the examples of MPEP § 2143. However, applicant notes that pursuant to MPEP 2143, **"the key to supporting any rejection under 35 U.S.C. § 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious."** Furthermore, in order to establish a *prima facie* case of obviousness, **three basic criteria should be met** as set forth in MPEP § 2143.01-2143.03. **First**, all claim limitations must be considered. MPEP § 2143.03. **Second**, there must be some suggestion or motivation to modify the references or combine reference teachings. MPEP § 2143.01. **Third**, there must be a reasonable expectation of success. MPEP § 2143.02.

1. The References Do Not Teach or Suggest All Claim Limitations

In the present case, it is respectfully submitted that neither Tuck nor Yazaki teach or suggest all the limitations of claims 20 and 26. Claims 20 and 26 both include the limitation of "wherein the sets of one or more flows are grouped into ranges, and wherein the policing instructions in respect of a particular set of one or more flows depends upon the range in which the set of one or more flows lies".

a. *Tuck*

Tuck describes an apparatus and method for monitoring data flow at a node on a network. As admitted by the examiner at page 10 of the May 14, 2008 Office action, Tuck does not disclose the limitation of "wherein the sets of one or more flows are grouped into ranges, and wherein the policing instructions in respect of a particular set of one or more flows depends upon the range in which the set of one or more flows lies".

In addition to the foregoing, the invention described in the present application has the unexpected advantage that scrubbing is not necessary. At paragraph [0045] Tuck

discloses scrubbing is necessary to avoid the bucket value becoming lower than the free flowing counter. This happens in Tuck if a packet is not received for an extended period and the free flowing counter value becomes higher than the bucket value. This problem is avoided in the invention of claims 15 and 22 (and dependent claims 20 and 26) by subtracting the packet length from the token bucket and adding a predetermined value at a regular interval to the token bucket.

b. *Yazaki*

Yazaki relates to a bandwidth monitoring method and device. At page 10 of the May 14, 2008 Office action, the examiner argues that Yazaki teaches “wherein the policing instructions in respect of a particular set of one or more flows depends upon the range in which the set of one or more flows lies” at column 10, lines 48-58. However, this cited portion of Yazaki merely describes the format of the bandwidth check table. The examiner has not described how the cited portion of Yazaki discloses “wherein the sets of one or more flows are grouped into ranges, and wherein the policing instructions in respect of a particular set of one or more flows depends upon the range in which the set of one or more flows lies”.

In addition to the above, Yazaki, like Tuck, does not disclose the limitations of amended claims 15 and 22 (from which claims 20 and 26 depend) of “subtracting the size of the packet from a value stored in the bandwidth counter corresponding to the set of one or more flows to obtain an adjusted value” and “replenishing each bandwidth counter with a predetermined value at regular intervals”.

c. *The Combination of Yazaki and Tuck*

As set forth above, neither Tuck nor Yazaki, alone or in combination disclose all the limitations of amended claims 20 and 26 (or base claims 15 and 22). Accordingly, it

is respectfully submitted that the Examiner has not made a *prima facie* case of obviousness and the 35 U.S.C. 103(a) rejection of claims 20 and 26 should be withdrawn.

2. There is No Motivation to Combine Tuck and Yazaki

The mere fact that references can be combined or modified does not render the resultant combination obvious unless “there is some teaching, suggestion or motivation” to combine the references. MPEP § 2143.01. Applicants respectfully submit that, while Tuck and Yazaki could be combined, the examiner has not established a teaching, suggestion or motivation for combining the references. Furthermore, the examiner has not established that the proposed resultant combination would have been predictable to one of ordinary skill in the art, as required by MPEP § 2143.01. As set forth in MPEP § 2143.01, “rejections based on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with rational underpinning to support the legal conclusion of obviousness.” “The key to supporting any rejection under 35 U.S.C. § 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious ... [and] the analysis supporting the rejection under 35 U.S.C. § 103 should be made explicit.” MPEP § 2143.

At page 10 of the May 14, 2008 Office action, the examiner provides only the following rationale for the combination of Tuck and Yazaki: “it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the features of Tuck III ‘306 by using features as taught by Yazaki ‘424 in order to provide bandwidth monitoring or flows according to bandwidth contact as suggested in col. 10, lines 37-58.” Applicant respectfully submits that this rationale provided by the examiner for combining Tuck and Yazaki is nothing more than a conclusory statement. The cited portions of Yazaki merely describe the format of the bandwidth check table.

One of ordinary skill in the art as of the date of the invention would not have been motivated to modify Tuck because of the format of the bandwidth check table of Yazaki.

For at least the reason set forth above, it is respectfully submitted that the examiner has not made a prima facie case of obviousness. Accordingly, it is respectfully submitted that the examiner's rejection of claims 20 and 26 under 35 U.S.C. § 103(a) should be withdrawn.

3. A Reasonable Expectation of Success Has Not Been Established

In order to establish a prima facie case of obviousness, the examiner must at least articulate a finding that there was reasonable expectation of success. See MPEP § 2143(G) and MPEP § 2143.02. However, in the May 14, 2008 office action, the examiner did not even attempt to establish such a finding of a reasonable expectation of success. Therefore, for at least this reason, the examiner has not made a prima facie case of obviousness, and the examiner's rejection under 35 U.S.C. § 103(a) should be withdrawn.



V. Conclusion

For all of the foregoing reasons, it is respectfully submitted that applicant have made a patentable contribution to the art. Favorable reconsideration and allowance of this application, including claims 15, 20-22 and 26-27, is therefore respectfully requested.

In the event applicant has inadvertently overlooked the need for an extension of time or payment of an additional fee, the applicant conditionally petitions therefore, and authorizes any fee deficiency to be charged to deposit account 13-0014.

Respectfully submitted,



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